In the High Court of Judicature at Madras

Dated: 10.02.2005

Coram:

The Honourable Mr. Justice S.R.SINGHARAVELU

Second Appeal No. 1028 of 1994

1. Arulraj
2. John Clement
3. Joseph ..Appellants/ Defendants

..vs..

Jabesthial ..Respondent/ Plaintiff

Second Appeal filed under Section 100 of Civil Procedure Code against the judgment and decree dated 19.04.1994 in A.S.No.7 of 1993 on the file of Sub Court, Dharmapuri, confirming the judgment and decree dated 04.01.1993 in O.S.No.722 of 1990 on the file of District Munsif Court, Dharmapuri.

For Appellants : Mr.N.Ishtiaq Ahmed
For Respondent : Mr.Selvakumar for Mr.R.Thamaraiselvan

JUDGMENT

This Second Appeal was directed against the decree and judgment dated 19.04.1994 of Sub Court, Dharmapuri in A.S.7 of 1993, by confirming the decree passed by the trial court (District Munsif Court, Dharmapuri) on 04.01.1993 in its O.S.722 of 1990.

2. During the course of admission of the second appeal, the following substantial questions of law were framed:

(1) Whether the Courts below erred in law in

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holding that the plaintiff / respondent has complied with the provisions of Section 16(c) of the Specific Relief Act, 1963 ?

(2) Whether the Courts below erred in law in granting a decree of specific performance for sale especially when serious allegation of frud has been made by the respondent with regard to the execution of Ex.A-1 dated 27.08.1987 ?

3. This is a suit for specific performance. Defendants 2 and 3 are the sons of the 1st defendant, who himself is the brother of plaintiff's husband. There was an agreement between the parties on 27.08.1987 under Ex.A-1, agreeing to sell 25 cents of land in Survey No.122 and 33 cents of land in Survey No.120 with right to irrigate in the well thereon, for a sum of Rs.10,000/= and that there was payment of advance of Rs.7,000/- to the defendants with a further clause that sale deed can be executed within a period of three years upon payment of the balance of Rs.3,000/- and in case, if the defendants were not ready to receive the said cash of Rs.3,000/-, it may be deposited in District Munsif Court, Dharmapuri. It is a registered document. The copy of registration itself will be proved for execution thereon. Therefore, it is idle for the appellants/defendants to contend, under their notice dated 21.06.1990 marked as Ex.A-2, as if Ex.A-1 was not an agreement for sale and that it was only executed as a mortgage. The further plea of the appellants in the written statement was that a fraud has been played. The element of fraud has to be proved only by the person who has pleaded so. In view of the fact that Ex.A-1 is a registered document and the recitals very clearly do show that it was executed as an agreement of sale, the mere denial under Ex.A-2 by the appellants/ defendants without any further evidence, may not go to substantiate their case of fraud and therefore, Ex.A-2 was issued only in avoidance of the agreement.

4. The respondent / plaintiff has immediately replied on 27.06.1990 under Ex.A-3 stating, besides other facts, that there was a subsequent understanding between the parties, in and by which the sum due under the pronote

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dated 28.08.1988 for a sum of Rs.2,000/= with interest at 2% per annum will have to be adjusted towards the balance of Rs.3,000/= found in the sale agreement and in case if the appellants/ defendants proposed not to act upon that understanding, plaintiff is ready to pay the entire balance of Rs.3,000/- reserving to take appropriate action to recover the sum due under the pronote. Of course the contents of this notice under Ex.A-3 was repudiated in the written statement. Subsequently under Ex.A-4 dated 05.07.1990, the respondent/ plaintiff has deposited a sum of Rs.3,000/- into a Nationalised Bank in her name and produced that document along with the plaint presented on 13.08.1990 praying for specific performance. In the plaint also, it was pleaded that she is willing to perform her part of the contract by paying a sum of Rs.3,000/-. In these circumstances, the finding of the courts below that Ex.A-1 was not intended to have been executed as a mortgage; that there was no fraud played as pleaded by the appellants/defendants and that it was a registered document and hence,it was found that Ex.A-1 was true and genuine and that finding is to be upheld for the reasons stated supra.

5. The counsel for the appellants / defendants further contended that plaintiff was never willing to perform her part of the contract as contemplated under section 16(c) of the Specific Relief Act and in that event, she may not be entitled for a decree for specific performance as it was also enunciated in Pukhraj D.Jain and others ..vs.. G.Gopalakrishna (2004(3) CTC 308). That was a case where plaintiff issued notice rescinding contract and filed suit for recovery of advance amount, which was decreed and strangely he himself preferred revision and got an order of rejection of plaint in that revision. It was held therein that the act of the plaintiff in first rescinding contract would go to show that he was never ready and willing to perform his part of the contract and therefore, he may not be entitled for any relief as the mandate of section 16(c)of the Specific Relief Act has not been complied with. But in our present case, it was the appellants /defendants, who had rescinded the contract first, issuing notice under Ex.A-2 on 21.06.1990, stating that it was not at all an agreement of sale and that it was only a mortgage. Now, it was found that it was only an

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agreement of sale and not mortgage as claimed by the appellants / defendants.

6. The next contention of the counsel for the appellants/ defendants is that since plaintiff was examined as P.W.1 who never deposed anything about her readiness and willingness to pay the balance of Rs.3000/-, it should be taken that there is no evidence on record in order to prove the pleading that she was ready and willing. In fact, what was contemplated under section 16(c) of Specific Relief Act was that one who seeks relief of specific performance should not only plead but also prove that he was ever ready and willing to perform his part of the contract. Now, according to the learned counsel for the appellants / defendants, since the plaintiff was examined as P.W.1, she did not depose anything about her readiness and that it should be taken that there was no compliance of mandate under section 16(c) of the Specific Relief Act.

7. There should be an evidence and that evidence need not be in a particular form. In the absence of oral evidence by P.W.1, what has to be seen is as to whether there is any documentary evidence available in proof of the readiness and willingness of the plaintiff to perform her part of the contract. She has rightly pleaded and that pleading was also stated to be conditional that in case pronote dated 28.08.1988 was adjusted towards the balance, the sum ought to have taken as paid. On a careful reading of the plaint, it is pleaded that even if that understanding was not complied with by the appellants/defendants in adjusting the pronote amount towards the balance of the agreement of sale, the plaintiff had categorically stated not only in her plaint pleading but also in the reply notice through Ex.A-3 that independent of the pronote dues, she would be ready and willing to perform her part of the contract by reserving the right of claiming the amount due under pronote by appropriate proceedings. As a matter of fact, she had also deposited even before filing of the suit on 13.08.1990, the required sum of Rs.3,000/- into a Nationalised Bank and the pass book was also filed along with the plaint. That passbook was marked as Ex.A-4, wherein we find, a deposit was made on 05.07.1990 itself. This amount has also not

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been withdrawn as seen from the pass book. Whether this will amount to show her willingness is the question. According to the learned counsel for the appellants / defendants, this may not show her willingness because what was agreed under Ex.A-1 was to make a cash deposit of Rs.3,000/= in the District Munsif Court. Any deposit made against the terms of contract cannot, according to the counsel, be treated as in-supportive of the terms of contract. In the Explanation of Section 16(c) of Specific Relief Act, it is mentioned that for the purposes of clause (c), where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court and then, it was also provided that the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction.

8. Counsel for the appellants / defendants argued upon the term "according to true construction" found in Explanation (ii) to section 16(c) that as per the constructed terms of agreement, what was required was payment of cash in court. Now, payment of cash in a Nationalised Bank was made and that passbook was tendered along with the plaint. Counsel for the respondent/plaintiff contended that the payment of cash into Court presupposes the filing of a suit and that without a suit being filed, no cash can be credited in the name of District Munsif Court. In other words, the cash can be credited in the District Munsif Court only in case a suit has been filed in that court. So, the true construction of Ex.A-1 agreement should be, that deposit in any form should be made into the court, when deposit of cash was not possible, due to the fact that there was no pendency of the suit between the parties regarding this issue. It was also not alleged that the deposited money was attempted to have been withdrawn by the respondent/plaintiff and in the absence of which, production of a passbook of a Nationalised Bank into which deposit was made and that production along with the plaint itself was prior to the expiry of three years term, as found in the agreement will, for the reasons stated above, necessarily go to show the readiness and willingness of the

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respondent/plaintiff. Therefore, the decree passed by the courts below is found correct and the substantial questions of law are answered in favour of the plaintiff.

9. Hence, the Second appeal is dismissed and the decree and judgment of the courts below are confirmed. No costs.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

gl

To

1) The Subordinate Judge,
   Dharmapuri.

2) The District Munsif,
   Dharmapuri.

+1 CC to Mr. N.Ishtiaq Ahmed, Advocate SR 6224
+1 CC to Mr.R.Thamaraiselvan, Advocate SR 5959

NG (co)
nk 21.02.2005.

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